

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

**U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II**

2012 MAR 29 P 1:38

**REGIONAL HEARING
CLERK**

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In the Matter of	:	
	:	
Hong Kong Supermarket, Inc.,	:	
	:	<u>COMPLAINT AND NOTICE OF</u>
	:	<u>OPPORTUNITY FOR HEARING</u>
Respondent.	:	
	:	Docket No. FIFRA-02-2012-5205
Proceeding Under the Federal	:	
Insecticide, Fungicide, and	:	
Rodenticide Act, as amended.	:	
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1. This Complaint and Notice of Opportunity for Hearing (Complaint) is filed pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA” or the “Act”), as amended, 7 U.S.C. § 1361(a), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Suspension of Permits (“Consolidated Rules of Practice” or “CROP”), 40 C.F.R. Part 22.

2. The Complainant, Director of the Division of Enforcement and Compliance Assistance, Region 2, United States Environmental Protection Agency (“EPA”), has been duly delegated the authority to institute this action.

3. Respondent is Hong Kong Supermarket, Inc. (hereinafter alternatively referred to as “Respondent”).

4. Respondent is a for-profit corporation operating in the State of New York.

5. Respondent has been, and continues to be, a “person” as defined by FIFRA Section 2(s), 7 U.S.C. Section 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.

6. Respondent is a “distributor or seller” within the meaning of Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).
7. Respondent is a “wholesaler”, “dealer”, “retailer,” or “other distributor” within the meaning of Section 14(a) (1) of FIFRA, 7 U.S.C. §136(a) (1).
8. Respondent owns and/or operates facilities located at 6023 8th Avenue, Brooklyn, New York 11220 and 157 Hester Street, New York, New York 10013.
9. Respondent’s facilities constitute “establishments”, as defined in Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd).
10. Respondent sells or distributes groceries and a variety of household goods, including pest control products, at the company’s retail facility at 6023 8th Avenue, Brooklyn, New York 11220, hereinafter “Respondent’s Brooklyn Facility.”
11. Respondent sells or distributes groceries and a variety of household goods, including pest control products, at the company’s retail facility at 157 Hester Street, New York, New York 10013, hereinafter “Respondent’s New York Facility.”
12. Respondent’s headquarters is located at 3711 Main Street, Flushing, New York 11354.
13. Section 2(mm) of FIFRA, 7 U.S.C. Section 136(mm) defines the term “antimicrobial pesticide” as, among other things, “a pesticide that (A) is intended to- (i) disinfect, sanitize, reduce, or mitigate growth or development of microbiological organisms.”
14. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term “pesticide” as, among other things, “(1) any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest.”
15. Respondent has distributed or sold the pesticides “Lanju Mosquito Coil” and “Liby Chao Wei Colophony Toilet Cleaner.”
16. Pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, all pesticides intended for distribution or sale must be registered with EPA.
17. Section 2(q)(1)(E) of FIFRA, 7 U.S.C. Section 136(q)(1)(E) states that a pesticide is misbranded if any word, statement or other information required to appear on the label is not likely to be read or understood by the ordinary individual under customary conditions of purchase and use.
18. Pursuant to 40 C.F.R. Section 156.10(a)(3), all pesticide products shall bear all required labeling text in the English language.

19. At the time of EPA's inspection of Respondent's Brooklyn Facility on September 15, 2011, EPA's inspectors observed 3 packages of Lanju Mosquito Coil which were located on the shelves at that establishment.

20. At the time of EPA's inspection of Respondent's New York Facility on September 16, 2011, EPA's inspectors observed fifteen 500-gram bottles of Liby Colophony Toilet Cleaner which were located on shelves at that establishment.

21. On February 9, 2012, EPA issued a Stop Sale, Use and Removal Order prohibiting the Respondent from selling the "Lanju Mosquito Coil," and "Liby Colophony Toilet Cleaner" pesticide products.

Counts 1&2

22. Complainant realleges each allegation contained in Paragraphs 1 through 21, inclusive, as if fully set forth herein.

23. On or about September 15, 2011, EPA conducted an inspection at Respondent's Brooklyn Facility.

24. EPA's September 15, 2011 inspection at Respondent's Brooklyn Facility was conducted pursuant to Section 9(a)(1) of FIFRA, 7 U.S.C. Section 136g(a)(1).

25. During EPA's inspection of Respondent's Brooklyn Facility there were 3 packages of Lanju Mosquito Coil being held for sale or distribution.

26. During EPA's inspection of Respondent's Brooklyn Facility, EPA obtained evidence of the distribution and/or sale of Lanju Mosquito Coil.

27. During EPA's inspection of Respondent's Brooklyn Facility a sample of the Lanju Mosquito Coil product was collected and assigned EPA Sample number 09151113731010201 sub A.

28. The label of the Lanju Mosquito Coil product had a picture of the Coil, which is used to repel mosquitos.

29. A "mosquito" is a "pest," as defined by Section 2(t) of FIFRA, 7 U.S.C. § 136(t) and regulations at 40 CFR § 152.5(a).

30. The "Lanju Mosquito Coil" is intended for preventing, destroying, repelling, or mitigating a pest, and therefore is a pesticide within the meaning of Section 2(u) of FIFRA, 7. U.S.C. § 136(u).

31. The only words written in English on the label of the Lanju Mosquito Coil product are the product name “Lanju Mosquito Coil,” as well as the following: “China Top Brand,” “Guandong Top Brand” and “Guandong Famous Trademark.”

32. The Lanju Mosquito Coil pesticide product has not been registered by EPA, as required by FIFRA Section 3, 7 U.S.C. Section 136a.

33. FIFRA Section 12(a)(1)(A), 7 U.S.C. Section 136j(a)(1)(A), provides it shall be unlawful for any person in any State to distribute or sell to any person any pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. Section 136a.

34. Respondent’s sale or distribution of the Lanju Mosquito Coil product without having registered it with EPA pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

35. FIFRA Section 12(a)(1)(E), 7 U. S.C. Section 136j(a)(1)(E), provides that it shall be unlawful for any person in any State to distribute or sell to any person any pesticide which is misbranded.

36. Respondent’s sale or distribution of the Lanju Mosquito Coil product with the label written mostly in the Chinese language, therefore misbranded, constitutes an unlawful act pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

Counts 3&4

37. Complainant realleges each allegation contained in Paragraphs 1 through 36, inclusive, as if fully set forth herein.

38. On or about September 16, 2011, EPA conducted an inspection at Respondent’s New York Facility.

39. EPA’s September 16, 2011 inspection at Respondent’s New York Facility was conducted pursuant to Section 9(a)(1) of FIFRA, 7 U.S.C. § 136g(a)(1).

40. During EPA’s inspection of Respondent’s New York Facility, EPA took photographs of the Toilet Cleaner product labels.

41. The label of the Toilet Cleaner product was written mostly in Chinese, except for the product name and a paragraph on “Directions.”

42. The label of the Toilet Cleaner product had only one paragraph written in English: “Directions: Specially append anti-bacterial formula, remove common coliform organisms, staphylococcus other bacteria. Keep lavatory long haul bright and leave with a colophony faint scent.”

43. The Toilet Cleaner product offered for sale or distribution by Hong Kong Supermarkets Inc. is intended to disinfect, sanitize, reduce or mitigate bacteria and microorganisms, and therefore is an “antimicrobial pesticide” as defined by Section 2(mm)(1) of FIFRA, 7 U.S.C. Section 136(mm)(1).

44. The term “pest” includes any virus, bacteria or other micro-organisms, section 2(t) of FIFRA, 7 U.S.C. Section 136(t).

45. The Toilet Cleaner product is intended for preventing, destroying, repelling or mitigating a pest and therefore is a pesticide within the meaning of Section 2 (u) of FIFRA, 7 U.S.C. Section 136(u).

46. The Toilet Cleaner product has not been registered by EPA, as required by FIFRA Section 3, 7 U.S.C. Section 136a.

47. FIFRA Section 12(a)(1)(A), 7 U.S.C. Section 136j(a)(1)(A), provides it shall be unlawful for any person in any state to distribute or sell to any person any pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. Section 136a.

48. Respondent’s sale and/or distribution of the Toilet Cleaner product without having registered it with EPA pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

49. FIFRA Section 12(a)(1)(E), 7 U.S.C. Section 136j(a)(1)(E), provides that it shall be unlawful for any person in any State to distribute or sell to any person any pesticide which is misbranded.

50. Respondent’s sale or distribution of the Toilet Cleaner product with the label written mostly in the Chinese language, therefore misbranded, constitutes an unlawful act pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. Section 136j(a)(1)(E).

PROPOSED CIVIL PENALTY

The proposed civil penalty has been determined in accordance with Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), as amended, which authorizes the assessment of a civil penalty of up to \$5,000 for each violation of “any provision of” subchapter II of FIFRA, 7 U.S.C. §§ 136 - 136y. The statutory maximum assessment per violation was raised to \$6,500 for the period March 15, 2004 through January 12, 2009. Effective after January 12, 2009, the statutory maximum is raised to \$7,500.

For purposes of determining the amount of any penalty to be assessed, Section 14 of FIFRA requires that EPA “shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person’s ability to continue in business, and the

gravity of the violation.” Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4).

To develop the proposed penalty in this Complaint, Complainant has taken into account the particular facts and circumstances of this case, to the extent known at the time of its filing, with specific reference to EPA’s “FIFRA Enforcement Response Policy [for] The Federal Insecticide, Fungicide and Rodenticide Act,” dated December 2009 (hereinafter referred to as the “ERP”). This guidance policy provides rational, consistent and equitable calculation methodologies for applying the statutory penalty criteria enumerated above to particular cases. A copy of the ERP is available upon request or may be obtained from the Internet at this address: <http://cfpub.epa.gov/compliance/resources/policies/civil/fifra/>.

Complainant proposes, subject to receipt and evaluation of further relevant information, that Respondent be assessed the following civil penalties for the violations alleged in this Complaint:

Sale/distribution of unregistered pesticide products	
2 Counts @ \$7,500 per violation (post 1/12/09).....	\$15,000
Sale/distribution of misbranded pesticide products	
2 Counts @ \$5,670 per violation (post 1/12/09).....	\$11,340
Total (rounded to the nearest \$100)	\$26,300

PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in 64 Fed. Reg. 40138 (July 23, 1999), entitled, “CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS”, and are codified at 40 C.F.R. Part 22 (2010). A copy of these rules accompanies this “Complaint and Notice of Opportunity for Hearing” (hereinafter referred to as the “Complaint”).

A. Answering the Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written Answer to the Complaint. (40 C.F.R. 22.15(a)) An Answer must be filed within 30 days after service of a Complaint. The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor**

New York, N.Y. 10007-1866

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. (40 C.F.R. § 22.15(a)).

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge (40 C.F.R. § 22.15(b)). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. (40 C.F.R. § 22.15(b)) The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding), and (3) whether Respondent requests a hearing (40 C.F.R. § 22.15(b)).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of its defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

B. Opportunity to Request a Hearing

If requested by Respondent in its Answer, a hearing upon the issues raised by the Complaint and Answer may be held (40 C.F.R. § 22.15(c)). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. (40 C.F.R. § 22.15(c))

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.35(b). A hearing of this matter will be conducted in accordance with the applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

C. Failure to Answer

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation (40 C.F.R. § 22.15(d)). If Respondent fails to file a timely (*i.e.*, in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)) Answer to the Complaint, Respondent may be found in default upon motion (40 C.F.R. § 22.17). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint (40 C.F.R. § 22.17(a)). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued therefore shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c) (40 C.F.R. § 22.17(d)). If necessary, EPA may then seek to enforce such final order

of default against Respondent, and to collect the assessed penalty amount, in Federal court.

D. Exhaustion of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives its right to judicial review (40 C.F.R. § 22.27(d)).

In order to appeal an initial decision to the Agency's Environmental Appeals Board [EAB; see 40 C.F.R. § 1.25(e)], Respondent must do so within 30 days after the initial decision is served (40 C.F.R. § 22.30(a)). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, five days shall be added to the time allowed by these [rules] for the filing of a responsive document. Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) (discussing when an initial decision becomes a final order) does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations (40 C.F.R. § 22.18(b)). At an informal conference with representative(s) of Complainant, Respondent may comment on the charges made in this Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business, and (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent or any relevant information previously not known to Complainant, or to dismiss any or all of the charges if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this complaint should be directed to:

Bruce Aber, Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, N.Y. 10007-1866
212-637-3224 (phone)
Aber.bruce@epa.gov

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing (40 C.F.R. § 22.18(b)(1)). Respondent's requesting a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. §22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written consent agreement (40 C.F.R. § 22.18(b)(2)). In accepting the Consent Agreement, Respondent waives its right to contest the allegations in the Complaint and waives its right to appeal the Final Order that is to accompany the Consent Agreement (40 C.F.R. § 22.18(b)(2)). In order to conclude the proceeding, a Final Order ratifying the parties' agreement to settle will be executed (40 C.F.R. § 22.18(b)(3)).

Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in the Consent Agreement terminates this administrative litigation and civil proceedings arising out of the allegations made in the Complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty within 30 days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the New York address noted above), a copy of the check or other instrument of payment (40 C.F.R. § 22.18(a)). A copy should also be provided to the EPA Assistant Regional Counsel identified on the previous page. Such payment shall be made by cashier's or certified check or by electronic fund transfer (EFT). If the payment is made by check, then the check shall be made payable to the "Treasurer, United States of America," and shall be mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

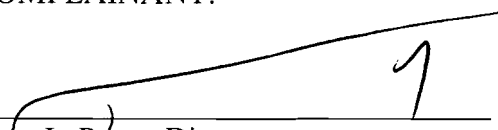
The check shall be identified with a notation listing the name of the matter (In the Matter of Hong Kong Supermarket, Inc.) and the Docket Number (FIFRA-02-2012-5205).

If Respondent chooses to make the payment by EFT, then Respondent shall provide the following information to its remitter bank:

- 1) Amount of Payment
- 2) SWIFT address: FRNYUS33, 33 Liberty Street, New York, NY 10045
- 3) Account Code for Federal Reserve Bank of New York receiving payment: 68010727
- 4) Federal Reserve Bank of New York ABA routing number: 021030004
- 5) Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"
- 6) Hong Kong Supermarket Inc.
- 7) Case Number: FIFRA-02-2012-5205

Pursuant to 40 C.F.R. § 22.18(a)(3), if Respondent elects to pay the full amount of the penalty proposed in the Complaint within 30 days of receiving the Complaint, then, upon EPA's receipt of such payment, the Regional Administrator of EPA, Region 2 (or, if designated, the Regional Judicial Officer), shall issue a Final Order. Issuance of this Final Order terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Further, pursuant to 40 C.F.R. § 22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's right both to contest the allegations made in the Complaint and to appeal said Final Order to federal court. Such payment does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable regulations and requirements, and to maintain such compliance.

COMPLAINANT:


Dore LaPosta, Director
Division of Enforcement and
Compliance Assistance
U.S. EPA, Region 2

Dated: March 23, 2012
New York, New York

TO: Ahn Tran, President
Hong Kong Supermarket, Inc.
3711 Main Street
Flushing, New York 11354

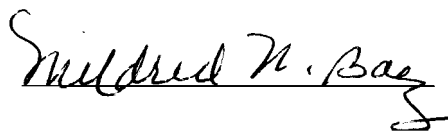
CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be mailed a copy of the foregoing Complaint, bearing docket number **FIFRA-02-2012-5205**, and a copy of the Consolidated Rules of Practice, 40 C.F.R. Part 22, by certified mail, return receipt requested, to:

Ahn Tran, President
Hong Kong Supermarket, Inc.
3711 Main Street
Flushing, New York 11354

I hand-carried the original and a copy of the foregoing Complaint to the office of the Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Dated: MAR 29, 2012
New York, New York


Mildred M. Bae